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No. 02-1173

IN THE
Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

SEAN GREENE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

Amicus Curiae Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a statutorily-created body corporate and politic. SEPTA operates a mass transit system in the Philadelphia metropolitan area, and outside the metropolitan area to the extent necessary for the operation of an integrated system. 74 Pa. C.S.A. §1701 (a), formerly 74 Pa. C.S.A. §1501 (a) (repealed). SEPTA provides bus, trolley, trackless trolley, subway, elevated and commuter rail services. As is the case with its bus, subway and trolley service, almost all of SEPTA's commuter rail service is provided within those five counties of Southeastern Pennsylvania that comprise the Philadelphia metropolitan area. Only three commuter lines provide links to cities out of state: one to Wilmington, Delaware, which is operated pursuant to a co-operative arrangement with the state of Delaware, and the two lines to Trenton and West Trenton, New Jersey. In the early 1980's, SEPTA was deemed to be a commuter authority under 45 U.S.C. §1004 and took over operation of certain inter-city commuter rail lines that had previously been operated by Conrail.[1]

SEPTA's enabling statute provides for a board of directors, which includes individuals appointed by the governor of Pennsylvania, the leadership of the General Assembly of Pennsylvania, and representatives from the five

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1. Pursuant to Rule 37.6 of the United States Supreme Court, SEPTA certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than SEPTA has made a monetary contribution to this brief in preparation or submission. The parties have provided letters to SEPTA granting consent or have lodged letters with the Court expressing their blanket consent to the filing of the amicus brief.

Pennsylvania counties that comprise the Philadelphia metropolitan area. In contrast to the structure adopted for the Long Island Railroad, SEPTA's enabling statute did not create two separate entities to operate the transit and commuter rail operations; instead SEPTA's commuter railroad is operated as a division of SEPTA.

The SEPTA workforce is comprised of approximately 9,100 employees. While most are subject to state workers' compensation provisions, approximately 1,200 employees are directly involved in railroad operations and are subject to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §51 *et seq.* These railroad division employees are provided pension benefits subject to standards imposed by the Railroad Retirement Act, 45 U.S.C. §231, *et seq.;* SEPTA's non-railroad employees, on the other hand, receive standard Social Security coverage. The railroad hourly employees and the hourly employees in the non-railroad operations are subject to different collective bargaining agreements, are represented by different unions, and are subject to different labor laws. Non-railroad employees are subject to the Pennsylvania Public Employe Relations Act, 43 P.S. 1101 *et seq.,* and railroad employees are subject to the Federal Railway Labor Act, 45 U.S.C. §151 *et seq.*

Under its enabling act, SEPTA is deemed to be exercising the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof. The Pennsylvania Supreme Court has held that SEPTA is a Commonwealth Agency for purposes of determining when the agency can be sued. Accordingly, under Pennsylvania law, negligence claims brought against SEPTA are limited to the exceptions set forth in Pennsylvania's Sovereign Immunity Statute. 42 Pa. C.S.A. §8501, *et seq.* See *Spencer v. SEPTA,* 525 Pa. 466, 581 A2d 565 (1990). That statute imposes a cap on the payment of damages for tort actions.

SEPTA is currently operating at a deficit. It has never operated at a profit. Its revenue is derived from the farebox, transit advertising and real estate rentals. SEPTA's operations and capital needs, however, are largely funded through monies received from the federal government and the Commonwealth of Pennsylvania, and from the various counties in which SEPTA operates on a proportionate basis. In the past ten years, SEPTA has had to initiate two reduction in force plans and various hiring freezes, particularly with reference to management and administrative staff.

Based on SEPTA's status as a Commonwealth Agency and recent litigation instituted asserting a FELA cause of action against it, SEPTA has an interest in this case. SEPTA has been sued by a salaried employee who does not work for SEPTA's Railroad Division. While inspecting a contractor's work at a railroad location, the plaintiff allegedly slipped and fell in a commuter parking lot. The station is on a line that does not operate interstate and at which no interstate trains stop. This accident occurred over two years ago and the employee collected worker's compensation benefits. SEPTA has always treated the employee as subject to Social Security and not as if he were eligible for Railroad Retirement Benefits. After the Second Circuit opinion in this case, however, the employee sued SEPTA under the FELA. His lawyer has readily admitted that the suit was brought based on the recent holding in *Greene v. Long Island Railroad Company*, 280 F.3d 229 (2nd Cir. 2002).

Litigation of this kind will significantly increase SEPTA's exposure to damage claims brought by its employees.

SUMMARY OF ARGUMENT

Amicus SEPTA respectfully suggests that the opinion by the Court of Appeals for the Second Circuit impermissibly expands the scope of FELA coverage. The Court of Appeals' expansive holding applying intra-corporate principles based on a parent-subsidiary analysis has no place in

determining the liability of a government agency. In contrast to the attempts by the District Court in *Greene* to define who is and is not a railroad employee, the Court of Appeals has provided no guidance as to which employees are in fact covered by the FELA and the result it has reached will necessarily increase litigation on this subject. In fact, SEPTA has already been sued in one case attempting to advance the theory set forth in the *Greene* decision.

Under the Court of Appeals' reasoning, whenever a state transit authority operates a railroad, the entire transit authority becomes subject to FELA and every employee becomes, in effect, a railroad worker, irrespective of the duties he/she performs. This is not in keeping with the original purposes of the FELA. Moreover, such a holding would be financially ruinous. Any holding that extends FELA coverage to all public transit agency employees will expose already fiscally strapped public transit agencies to increased litigation costs associated with defending FELA claims and to unpredictable jury results. Indeed, to avoid this result, agencies such as SEPTA may be forced to reconsider whether they can continue to provide railroad commuter service.

This new rule enunciated by the Court of Appeals will also interfere with employees' rights to be covered by Social Security retirement plans and will impact on their collective bargaining agreements. The increased costs associated with permitting every employee to litigate and collect for pain and suffering for work related injuries will be very damaging to state agencies that operate with limited budgets and continuing capital needs. SEPTA therefore urges this Court to intervene and make it clear that state agencies are not subject to the FELA or at least limit FELA to its originally intended scope: those employees who are directly involved in interstate railroad activities or directly and substantially affect such commerce.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED BECAUSE THE FELA WAS NOT INTENDED TO APPLY TO STATE GOVERNMENT AGENCIES

The holding in this case is not consistent with the original purpose of the FELA. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), the courts were directed to consider both the "nature of the injury and the character of the tortious activity" when deciding whether the FELA could be invoked. In the present case, the alleged tortious activity was the failure to provide a "safer car" for an employee who was injured in a routine traffic accident on the way to a railroad station – surely a purely local activity that has no impact on interstate rail service or commerce. The application of the FELA to this run-of-the-mill local traffic accident contravenes the purpose of the FELA, the principles of federalism, and infringes on a state's sovereign immunity.

SEPTA's status as an instrumentality of the Commonwealth of Pennsylvania is undeniable. SEPTA was created when the General Assembly enacted "The Metropolitan Transportation Authorities Act of 1963". 66 Pa. C.S.A. §2001 (repealed). In that statute, SEPTA was given the right to sue and be sued. 66 Pa. C.S.A. §2004(d)(2) (repealed) now – 74 Pa. C.S.A. §1701, *et seq.* Nevertheless, SEPTA is immune from suit unless a plaintiff has a cause of action that falls within an exception to Pennsylvania's Sovereign Immunity Act. *See* The Metropolitan Transportation Act of 1994,[2] 74 Pa. C.S.A. §1741(a)(2). In fact, 74 Pa.C.S.A. §1711(3) specifically states:

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2. SEPTA, pursuant to statutory authority, can exercise powers of condemnation and eminent domain. 74 Pa. C.S.A. §1741 (12) and 74 Pa. C.S.A. §1742(6).

It is hereby declared to be the intent of the General Assembly that an authority created or existing under this chapter . . . shall continue to enjoy sovereign and official immunity, as provided reaffirmed; (specific waiver), and shall remain immune from suit except as provided by and subject to the provisions of 42 Pa. C.S. §8501 (relating to definitions) through §8528 (relating to limitations on damages)".

To understand the scope of SEPTA's immunity, it is necessary to review the legislative scheme.

1 Pa. C.S. §2310 states:

§2310. Sovereign Immunity Reaffirmed Specific Waiver

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.

42 Pa. C.S.A. §8521 (a) states:

§8521. Sovereign immunity generally

(a) **General rule** – Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. §2310 (relating to

sovereign immunity reaffirmed; specific waiver) or otherwise.

Section 8522 sets forth the exceptions to sovereign immunity applicable to Commonwealth agencies such as SEPTA.[3] Consequently, SEPTA is immune from liability unless the claim is based on one of the exceptions to sovereign immunity found in 42 Pa. C.S. §8522.

There is an abundance of case law that SEPTA – an agency and instrumentality of the Commonwealth – cannot be sued for monetary damages unless sovereign immunity has been explicitly waived. This longstanding principle of sovereign immunity is written into the Constitution of the Commonwealth of Pennsylvania. Article 11 provides that "suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct." *See, e.g., Chittister v. Dept. of Community and Economic Development,* 226 F.3d 223 (3rd Cir. 2000) (Pennsylvania state agency had not consented to suit under the FMLA.)

While the Eleventh Amendment governs the jurisdiction of federal courts over the states and immunities from certain state actions, it is not the source of a state's immunity from actions in a state's own courts. *See Alden v. Maine,* 527 U.S. 706 (1999). A state's immunity from suit in its own courts is derived from common law and the state immunity derived from its constitution. A state agency cannot be deemed to have consented to suit in federal or state court simply because it operates a railroad. Indeed, the doctrine of constructive waiver has effectively been repudiated by recent precedent. *Will v. Michigan Depart-*

3. There are nine exceptions: negligence claims based on operation of motor vehicles; injuries due to a medical professional; liability that is derived from a defect of the real estate; injuries caused by personal property; potholes and dangerous conditions of highways; custody or control of animals; liquor state sales; acts of members of national guard; vaccines and toxoids.

ment of State Police, 491 U.S. 58, 65 (1988) (if Congress intended to alter the usual constitutional balance between the states and the federal government the intention must be made clear); *Kimmel v. Florida Bd. of Regents,* 528 U.S. 62 (2000) (Congress must demonstrate a clear intent to have ADEA apply to the state); *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001) (Congress must demonstrate a clear intent to have the ADA apply to the states.)[4] It follows that there is no basis for permitting a FELA action to proceed against a state created railroad in either state or federal court. *See, e.g., Alabama State Docks Terminal Railway v. Lyles,* 797 So. 2d 432 (Ala. 2001).

When the Northeastern Regional Rail Reorganization Act went into effect, SEPTA – an agency of the Commonwealth of Pennsylvania – could have contracted with Amtrak Commuter, another entity, or operate the railroad itself. SEPTA decided to operate its rail division as exactly that: a division of SEPTA's mass transit operations.

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4. In *Parden v. Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964), a five to four majority held that by operating a railroad in interstate commerce Alabama had waived its immunity to suit. Emphasis was placed on the fact that Alabama had entered the rail business twenty years after the FELA had been enacted. The dissenting Justices did not believe that the requisite intent of Congress to extend the FELA to the states or that a state could waive immunity by operating a railroad. Subsequently, a majority of the Supreme Court agreed with the reasoning of the dissenters. In *Welch v. Texas Department of Highways & Public Transportation,* 483 U.S. 468 (1987), the Court expressly overruled the reasoning of *Parden* in an action brought under the Jones Act. *Id.* at 478. The Court held "to the extent that *Parden v. Terminal Railway* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id.* In *Hilton v. South Carolina Public Railways Commission,* 502 U.S. 197 (1991) an FELA action filed in state court was found to be maintainable notwithstanding the overruling of *Parden* in *Welch. Id.* at 199, 204-05. The court found that the government entity had consented to jurisdiction in state court by voluntarily operating a railroad. In this instance, SEPTA did not choose to voluntarily operate interstate rail service.

It is true that courts have held that the employees of the railroad division are subject to the FELA, but that is no reason to make all of SEPTA's *other* operations subject to the FELA. *See, e.g., Felton v. SEPTA,* 952 F.2d 59 (3rd Cir. 1989). This was never intended by anyone. After all, the act that provided for SEPTA to incorporate inter-state lines did not mention the FELA as an applicable statute. See 45 U.S.C. §591 (repealed). Indeed, the successor statute refers to the rail operations as being governed by safety provisions – and the FELA does not contain any safety provisions. See 49 U.S.C. §20101. To expand the FELA to all divisions of SEPTA would be inconsistent with the intent of the Act.

The Second Circuit holding in *Greene* taken to its logical conclusion is that if an entity operates a railroad then all employees are railroad employees. This holding greatly expands the FELA and fails to consider whether the services provided by the employee further or affect interstate transportation. *See, e.g., Reed v. Pennsylvania R. Co.,* 351 U.S. 502, 507 (1956); *Hall v. Southern Pac. Co.,* 71 F. Supp. 21, 24-25 (N.D. Cal. 1944) (does employee do an act which laid the foundation for and was an act of another or subsequent act of interstate commerce or a step towards it). Further, the Second Circuit would completely abandon the long recognized distinction between interstate railroads and urban railroads, such as trolleys and subways. Urban railroads have long been recognized as outside the scope of the FELA. *See Ohara v. Council Bluffs Street Railway Co. v. Interstate Commerce Commission,* 230 U.S. 324 (1913). Under the *Greene* holding, every operational component will now be deemed part of the railroad operations and this ignores the language of the statute that a covered employee of a carrier includes any employee whose duties "shall be in furtherance of interstate or foreign commerce, or shall in any way directly or closely and substantially affect such commerce." 45 U.S.C. §51 The intent behind the passage of the FELA was the concern over injuries to employees

engaged in the business of interstate railroads and the holding in *Greene* abandons that analysis.[5]

* * * *

After these lines were taken over from Amtrak, SEPTA treated all of these lines, which were originally part of Amtrak, as part of the Rail Division. The operation of SEPTA has been structured in a manner consistent with this need to distinguish between railroad employees and all of its other employees. There is no "interstate" aspect to the job of a porter who cleans a subway station in SEPTA's City Transit Division. Nevertheless, under the reasoning of the Court of Appeals, an individual who was injured because his chair collapsed in an office remote from a railroad location, while he was preparing bus schedules, will now be subject to the FELA merely because SEPTA operates a commuter rail line as one of its public transit operations. That employee could now bring a claim under the FELA even though his activities do not involve and have no significant impact upon interstate commerce. Moreover, this is plainly not the type of dangerous work that the FELA was meant to address. The Court of Appeals and the District Court holdings in *Greene* have completely abandoned the statutory mandate to determine whether the employee is, in fact, furthering interstate activities.

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5. At the time the FELA was enacted to meet the concerns that private companies were not addressing the needs of railroad employees, a state-owned railroad could not have been sued without its consent. State-owned railroads did not have to depend – as did privately owned railroads – on common law defenses, such as contributory negligence or the fellow-servant rule in order to escape liability for injuries to its employees. All state owned railroads would have had to do would be to invoke the defense of sovereign immunity. There is no reason to conclude that Congress intended by its enactment of the FELA to strip the states of this jealously guarded right of defense, when not even a hint of such an intent can be gleaned from the legislative history of the act. H.R. Rep. No. 1386, 60th Cong. 1st Sess. 1908.

Finally, there is no good reason to apply the parent-subsidiary or joint venture concept to a government agency simply to expand the coverage of the FELA. It makes no sense to adhere to corporate formalities imposed for private/profit corporations on a state agency. To impose such requirements on how a state chooses to carry out government functions interferes with the state's sovereign rights. Likewise, a "piercing" or "alter-ego" argument cannot result in a finding that the state transit agency should be deemed a railroad for all purposes. A common law "piercing" or "alter ego" test generally involves two components – (1) a disregard for corporate formalities and (2) a use of the corporation in a manner that promotes fraud or injustice. 38 A.L.R.3d 1102, §15. Assuming that one finds that corporate formalities were not adhered to, then counsel for the amicus suggests that no liability could ever be imposed as the second prong of a piercing test cannot be met. Piercing is an equitable remedy employed to prevent fraud or injustice. Fraud or injustice could never be established when assessing claims against a state agency. It would be absurd to hold that a sovereign state – which must consent to suit in the first instance – would have to engage in a fraud to shield its treasury from claims or that a state agency funded by the taxpayers was designed to promote fraud or injustice.

Under the reasoning of the Court of Appeals, any state agency that operates or provides support to a rail operation would be subject to the FELA. Indeed, taking the parent-subsidiary argument to its logical conclusion – *all* state employees would be subject to the FELA because it is the state itself that operates the railroad. This holding infringes on the state's sovereignty and improperly tells the state how it should operate its mass transit operations. By construing the FELA to cover all operations of a transit agency, the Court of Appeals has directly infringed on the right of the state to organize its agency in the most cost efficient use of resources and funding.

B. THE EXPANSION OF THE FELA IS NOT WARRANTED WHEN THERE ARE WORKER'S COMPENSATION MECHANISMS IN PLACE AND THE EXTENSION OF THE FELA WILL JEOPARDIZE THE ABILITY OF AGENCIES TO FUNCTION

The FELA is a federal negligence statute. 45 U.S.C. §51 *et seq.* Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943). The basis of a recovery is that the railroad was negligent, that is "whether the employer's negligence had played any role in the harm and this standard of responsibility is based on foreseeability." See, e.g., *Gallick v. Baltimore & Ohio Railroad,* 372 U.S. 108 (1963).[6]

At the time that the FELA was enacted, the railroad industry was very different than it is today. The private railroads were collectively the largest employer in the country. See Herde, *FELA-Should It Be Abolished?* 17 Forum 407, 410 (1981). There was an abundance of labor, unions were virtually unknown, and few states had any type of worker's compensation or state disability provisions. See W.P.Keeton, D. Dobbs, and B. Keeton & D. Owen, *Posser and Keeton on the Law of Torts*, at 572-73 (5th Ed. 1984).[7]

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6. As it happens, the case law under the FELA has evolved to be virtually a strict liability statute resulting in increased litigation costs because it is virtually impossible to have a case dismissed prior to trial. Because the FELA only requires the slight evidence of negligence, thereby requiring less proof, only the slightest degree of evidence results in a question being raised for the trier of fact. See *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500 (1957), *reh. den.*, 353 U.S. 943 (1958).

7. Pennsylvania worker's compensation provisions do not exempt railroad workers and cover "all employees". If, in fact, a state has exempted railroad workers – which Pennsylvania has not – then FELA coverage could remain in place or it would be up to the state legislatures to amend or modify said statutes to address the needs of railroad employees. In *Hilton v. South Carolina Public Railways Commission, supra,* this Court stated that certain states had exempted railroad workers from coverage and it was concerned over changing long-standing employee relationships. This rationale, however, should not be controlling as it disregards the rights of individual states.

Railroad work was also considered to be very dangerous, with one of the highest accident rates in history, including fatalities. In fact, one railroad employee out of eight was injured and one out of every 125 was killed.[8]

Today, there is a debate on whether or not the railroad industry remains as dangerous as when the FELA was first enacted. See Babcock and Oldfather, *The Role of the Federal Employer's Liability Act in Railroad Safety,* 19 Trans. L. J. 881 (1990-1991). There is no debate that railroad employment has decreased continuously. In the time period from 1980 to 1989, railroad employment decreased by 40% and reportable injuries decreased by 60%. Nevertheless, the FELA payout during the same time period increased over 130% ($343 million to $789 million). See Baker, *Why Congress Should Repeal the Federal Employer's Liability Act of 1908,* 29 Harv. J. of Legis, 79, 104 (1992). In 1990, the average payout of a litigated FELA case was $166,000 as opposed to $42,000 in 1980. See 1990 Report of Claim and Litigation Expense-Association of American Railroads; Phillips, *FELA Revisited,* 52 Md. L. Rev. 1062 (1993) (lawsuits, which account for less than 11% of FELA claims represented 35% of the total FELA payout). This figure illustrates the catastrophic effect of lawsuit claims on total payouts. The reason for this increase is not due to catastrophic injuries but rather to the availability in

8. Notably, in 1988, 50% of the injuries under the FELA were sprains and strains. In 1988 there were 64 amputations and 1,289 fractures. The fractures presumably included fingers and toes. The construction, mining, and manufacturing industries had higher amputation rates and the mining and construction industries had a higher fracture rate. See E. Saphine, *FELA and Rail Safety: A Response to Babcock and Oldfather–the Role of the Federal Employer's Liability Act in Railroad Safety,* 19 Transp. L. J. 901 (1990-1991).

addition to lost wages – of an award for lost future earnings, and pain and suffering.[9]

FELA cases also expose the state agency operating a commuter railroad to unpredictable awards, even if the employee is contributorily negligent, because of the component of pain and suffering and claims of permanency.[10] It is also worth noting that FELA claims are frequently built up by the employees staying out on the advice of counsel to bolster their claim for damages before a jury. The same employee who has claimed in litigation that he is unable ever to return to work and has claimed

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9. In a litigated case against SEPTA, an employee claimed that he slipped due to ballast. Despite the fact that there is no federal standard for ballast, the employee claimed that the ballast in the rail yard was harder to walk on than the ballast on mainline track. The employee returned to work and was earning close to the same amount of money; nevertheless, he claimed that his opportunities for overtime were limited, he had experienced pain and suffering, and was unable to play ball with his child. The employee was awarded over $660,000. Recently reported in the Legal Intelligencer, *"Ex-Amtrak Worker Awarded $2.5 Million in FELA Action"*, Feb. 18, 2003, pg. 1, was an FELA jury verdict. An Amtrak trackman, age 52, claimed to have two herniated discs. There was no surgery, his wage loss was estimated to be $350,000 and he was awarded $2.5 million.

10. Employees sometimes stay out so as to increase an FELA recovery. A report filed by Amtrak indicated that two years after one accident only one employee out of eleven had returned to work and that in a minor derailment in which no passengers were injured all fifteen employees claimed injury and had not returned to work. See Baker, *supra*, at 103. Indeed the trend was toward employees staying out to build up their claim of permanency. In one litigated SEPTA case, an employee claimed a permanent back injury and his doctor testified he would not be able to do his job. As part of the settlement on the record, the employee agreed (1) not to return to the railroad and (2) to take a sedentary job. After receiving his settlement, the employee then filed a grievance with the Railroad Retirement Board to obtain his position back, and claimed he had recovered. *United Transportation Workers' v. SEPTA*, Case #368. SEPTA then sought repayment of the award paid only two months earlier. Nevertheless, the court and the Railroad Retirement Board condoned this behavior and accepted the employee's claim that he was miraculously "cured".

"permanent damage" can then miraculously return to his former employment after receiving an award or a settlement. Additionally, since many FELA claimants immediately retain counsel, the cost of even a settlement is driven up because an attorney generally obtains a fee of 30 to 40%. *See, e.g.*, Herde, *supra*.[11]

Finally, this opinion will cause havoc with respect to existing labor negotiations and pension rights. If we are to treat all employees as if they are now railroad employees then existing contracts with the non-railroad unions will have to be renegotiated. Does this mean that all employees who were previously subject to bargaining with the unions that represent bus, trolley, and subway operators are now covered by another union? What about the pensions of employees in the City Division, a pension that is based on a formula under the benefits accorded through Social Security? Moreover, what happens to an employee in his fifties, who has just joined SEPTA? Under provisions of the Railroad Retirement Program an employee is required to work for forty quarters before vesting. Under the reasoning of *Greene,* would an employee deemed to be a railroad employee for purposes of FELA have to start contributing to the Railroad Retirement System and then be removed from the Social Security System? If the same employee ceased next year being involved with railroad projects would he then go back to Social Security? Since SEPTA's pension for non-railroad employees is based on contributions to Social Security this opinion implicates pension rights of its entire workforce.

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11. A book informing railroad workers of their rights suggests that they answer as little as possible about an accident. See, John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* 3-5 (1987). Obviously, after consulting with an attorney or union representative the accident report can be phrased in a way to establish the railroad's negligence. From the outset of the injury, the claim is immediately geared towards litigation and to build up the damages.

The Second Circuit opinion invites litigation, will deplete limited resources and impact on the retirement benefits and collective bargaining rights of numerous employees and should be overturned.

CONCLUSION

Initially, the first FELA statute was found unconstitutional because it attempted to regulate purely intrastate activities. *See Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908). Subsequently, the statute was reenacted in its present form to regulate *only* interstate railroad activities. See 45 U.S.C. §51 *et seq.* (1982). The Court of Appeals' holding in this case jeopardizes any state entity that operates commuter rail lines and its logical result is for a state to curtail any such service. Now, instead of 1,200 public employees of SEPTA who are covered by the FELA, the logical extension of the Court of Appeals' opinion is that the remaining 7,900 employees of SEPTA can also now sue under the FELA. Such an extension to every employee of the agency – no matter how remotely connected with the operation of the interstate railroad – was never the intent of the Act and offends principles of sovereign immunity. This holding will result in operating deficiencies and may result in the withdrawal of rail service run by state agencies.

Certiorari should be granted to provide guidance on an expedited basis before agencies across the country are exposed to suits and increased costs while the resolution of who is covered by this Federal statute is further delayed and subject to litigation in each Circuit.

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